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Leonard Teoh Hooi Leong v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–08 OF 2002
RAUS SHARIF, SULONG MATJERAIE AND AHMAD MAAROP JJCA
10 OCTOBER 2009

C

Criminal Procedure — Police investigation — Application to revoke remand order — Whether magistrate had ample grounds to determine if applicant ought to be remanded for purposes of police investigation — Whether High Court had reasons to justify revocation of magistrate's remand order — Whether police acted in abuse of powers in applying for remand — Whether revision application proper mode of challenging abuse of power by police

D

Criminal Procedure — Police investigation — Investigation diary — Whether police investigation diary required to be produced before magistrate in remand proceedings — Failure to produce diary, effect of — Criminal Procedure Code ss 117 & 119

E

Criminal Procedure — Revision — Powers of High Court — Whether revisionary powers of High Court discretionary in nature — Courts of Judicature Act 1964 s 31 — Criminal Procedure Code ss 323, 324, 325, 326 & 327

F

Evidence — Privilege — Legal professional privilege — Communication between solicitor and client — Whether communication privileged where solicitor investigated over criminal case — Evidence Act 1950 s 126

G

Legal Profession — Professional privilege — Communication between solicitor and client — Whether communication privileged where solicitor investigated over criminal case

H

The appellant, an advocate and solicitor, was retained to act for a client ('the client') in a religious conversion matter. The client then disappeared from her parents' home. A police report alleging that the client had been kidnapped by her lover was lodged by the client's parents. The police carried out extensive investigations into the alleged kidnapping and subsequently arrested the appellant. The appellant was then produced before a magistrate in remand proceedings pursuant to s 117 of the Criminal Procedure Code ('CPC'). The

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magistrate, after considering a letter from the investigating officer, the police report and the police investigation diary ordered the appellant to be remanded for seven days. The appellant applied to the High Court to revoke the remand order on revision, but the High Court refused to do so. The appellant thus appealed against the High Court's refusal to revoke the remand order. Counsel submitted that the appellant was protected by solicitor-client privilege under s 126 of the Evidence Act 1950 and thus the detention of the appellant under s 117 of the CPC was an abuse of power by the police. Counsel also tendered in support a newspaper article reporting the remarks of an appellate judge, to the effect that the appellant's remand was an abuse of power, when granting the appellant's application for extension of time to file leave to appeal.

Held, dismissing the appeal:

(1) What the Court of Appeal said and held in relation to the appellant's application for extension of time to file leave to appeal, could not be the basis in deciding the instant appeal. The full facts and the real issues in the appeal were not before the Court of Appeal then. The merits of the appeal had not been determined by the Court of Appeal then (see para 16).

(2) Section 117 of the CPC requires the police to produce a copy of the investigation diary before the magistrate as prescribed by s 119 of the CPC when producing a suspect. The diary must provide a true picture of the proceedings in the investigation. If the magistrate upon perusal of the entire diary is satisfied that there are grounds for believing that the information against the suspect is well founded and it is necessary for the investigation to remand him, the magistrate may make the remand order. It is for the magistrate to determine at his discretion, the length of the remand order, provided the detention does not exceed 15 days in the whole as stated in the then s 117(2) of the CPC. Failure to produce the investigation diary or copies of entries thereof before the magistrate would be fatal to a remand application (see para 17); *Re the detention of R Sivarasa & Ors* [1996] 3 MLJ 611 followed; *Public Prosecutor v Audrey Keong Mei Cheng* [1997] 3 MLJ 477 followed.

(3) In the instant case, there was no dispute that the magistrate had before him a letter from the investigating officer of the case which set out the need to remand the appellant, the police report on the alleged kidnapping, and most importantly the investigation diary. The magistrate was thus satisfied that there were grounds for believing the accusation against the appellant and that it was necessary for the purposes of the investigation to remand the appellant (see para 19).

(4) The High Court judge was correct in refusing to exercise his revisionary power to reverse the decision of the magistrate. In the instant case, the

procedure under s 117 of the CPC had been complied with. The appellant could not hide behind the 'skirt of privilege' when he was being investigated over a criminal case (see para 20).

(5) When the case was before the magistrate, it was still at an investigation stage. At that stage it was not the duty of the magistrate to decide on the legality of the appellant's arrest or otherwise. The truth that the appellant was involved in the kidnapping could not be determined at that stage. Since the truth of whether the appellant was involved in the kidnapping or otherwise was still under investigation, the High Court judge was in no position to determine whether the act of the police in applying for the appellant's detention was an abuse of power. If the appellant felt that such actions of the police were in fact an abuse of power, he was at liberty to take the appropriate action against the police, but not by way of revision as in the instant case (see para 21).

(6) The revisionary powers of a High Court judge are discretionary in nature and are to be found in s 31 of the Courts of Judicature Act 1964 and ss 323–327 of the CPC. Their object is for the High Court to be satisfied as to the correctness, legality or propriety of any finding, sentence or order recorded or passed in respect of criminal proceedings and matters in the subordinate courts. In the instant case, the High Court judge had examined the record of the proceedings of the magistrate and found that the magistrate had acted within the law when remanding the appellant for seven days under s 117 of the CPC. He chose not to interfere with the magistrate's order or decision. There were no reasons for the Court of Appeal to interfere with the High Court's order (see para 22); *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69 referred.

[Bahasa Malaysia summary

Perayu, seorang peguam bela dan peguam cara, telah dibayar untuk bertindak bagi pihak anak guam ('anak guam') dalam satu perkara pertukaran agama. Anak guam tersebut kemudian telah menghilangkan diri daripada rumah ibubapanya. Satu laporan polis yang mendakwa bahawa anak guam telah diculik oleh kekasihnya telah dibuat oleh ibu bapa anak guam. Polis telah menjalankan siasatan terperinci terhadap dakwaan penculikan itu dan berikutan itu telah menangkap perayu. Perayu kemudian telah dikemukakan ke hadapan majistret dalam prosiding penahanan menurut s 117 Kanun Prosedur Jenayah ('KPJ'). Selepas mempertimbangkan surat daripada pegawai penyiasat, laporan polis dan diari siasatan polis, majistret telah memerintahkan perayu ditahan selama tujuh hari. Perayu telah memohon ke Mahkamah Tinggi untuk membatalkan perintah tahanan untuk semakan, tetapi Mahkamah Tinggi enggan berbuat demikian. Perayu dengan itu telah merayu terhadap keengganan Mahkamah Tinggi untuk membatalkan perintah tahanan itu. Peguam berhujah bahawa perayu dilindungi oleh hak

keistimewaan peguam-anak guam di bawah s 126 Akta Keterangan 1950 dan oleh itu penahanan perayu di bawah s 117 KPJ adalah penyalahgunaan kuasa oleh polis. Peguam juga mengemukakan sebagai sokongan artikel akhbar yang melaporkan kenyataan hakim rayuan, yang menunjukkan bahawa penahanan perayu adalah satu penyalahgunaan kuasa, apabila membenarkan permohonan perayu untuk lanjutan masa untuk memfailkan kebenaran untuk merayu.

Diputuskan, menolak rayuan:

(1) Apa yang dikatakan dan diputuskan oleh Mahkamah Rayuan berkaitan permohonan perayu untuk lanjutan masa bagi memfailkan kebenaran untuk merayu tidak boleh dijadikan asas untuk membuat keputusan dalam rayuan ini. Fakta penuh dan isu-isu sebenar dalam rayuan tersebut tidak dihadapkan ke Mahkamah Rayuan pada masa itu. Merit rayuan masih belum ditentukan oleh Mahkamah Rayuan pada masa itu (lihat perenggan 16).

(2) Seksyen 117 KPJ menghendaki polis mengemukakan salinan diari siasatan di hadapan majistret sepertimana ditetapkan oleh s 119 KPJ apabila mengemukakan orang yang disyaki. Diari itu hendaklah memberikan gambaran sebenar prosiding dalam siasatan. Jika majistret setelah meneliti keseluruhan diari berpuas hati bahawa terdapat alasan-alasan untuk mempercayai yang maklumat terhadap orang yang disyaki itu berasas dan adalah perlu untuk siasatan menahannya, majistret boleh membuat perintah tahanan. Adalah untuk majistret menentukan atas budi bicaranya, tempoh perintah tahanan itu, dengan syarat penahanan itu tidak melebihi 15 hari secara keseluruhan seperti yang dinyatakan dalam s 117(2) KPJ pada masa itu. Kegagalan untuk mengemukakan diari siasatan atau salinan catatan tersebut di hadapan majistret akan memudaratkan permohonan tahanan (lihat perenggan 17); *Re the detention of R Sivarasa & Ors* [1996] 3 MLJ 611 dan *Public Prosecutor v Audrey Keong Mei Cheng* [1997] 3 MLJ diikut.

(3) Dalam kes ini, tidak ada pertikaian bahawa di hadapan majistret telah dikemukakan surat daripada pegawai penyiasat tentang kes yang menyatakan keperluan untuk menahan perayu, laporan polis tentang dakwaan penculikan itu, dan yang paling penting diari siasatan itu. Majistret dengan itu berpuas hati bahawa terdapat alasan-alasan untuk mempercayai tuduhan terhadap perayu dan bahawa ia perlu bagi tujuan siasatan untuk menahan perayu (lihat perenggan 19).

(4) Hakim Mahkamah Tinggi adalah betul apabila enggan menggunakan kuasa semakan beliau untuk mengakas keputusan majistret. Dalam kes ini, prosedur di bawah s 117 KPJ telah dipatuhi. Perayu tidak boleh berlindung di sebalik 'skirt of privilege' apabila dia sedang disiasat berhubung kes jenayah (lihat perenggan 20).

(5) Semasa kes itu di hadapan majistret, ia masih dalam peringkat siasatan. Di peringkat itu ia bukan menjadi kewajipan majistret untuk memutuskan tentang kesahan tangkapan perayu atau sebaliknya. Kebenaran bahawa perayu terlibat dalam penculikan itu tidak boleh ditentukan di peringkat itu. Memandangkan kebenaran sama ada perayu terlibat dalam penculikan itu atau sebaliknya masih disiasat, hakim Mahkamah Tinggi tidak berada dalam kedudukan untuk menentukan sama ada tindakan polis yang memohon penahanan perayu adalah satu penyalahgunaan kuasa. Jika perayu merasakan bahawa tindakan polis tersebut pada hakikatnya satu penyalahgunaan kuasa maka dia mempunyai hak kebebasan untuk mengambil tindakan yang sewajarnya terhadap pihak polis, tetapi bukan secara semakan seperti dalam kes ini (lihat perenggan 21).

(6) Kuasa-kuasa semakan seorang hakim Mahkamah Tinggi bersifat budi bicara dan boleh didapati dalam s 31 Akta Mahkamah Kehakiman 1964 dan ss 33–327 KPJ. Tujuan seksyen-seksyen tersebut adalah agar Mahkamah Tinggi berpuas hati dengan ketepatan, kesahan atau kesesuaian apa-apa penemuan, hukuman atau perintah yang direkodkan atau diputuskan berkaitan prosiding jenayah dan perkara-perkara di mahkamah bawahan. Dalam kes ini, hakim Mahkamah Tinggi telah memeriksa rekod prosiding majistret dan mendapati bahawa majistret telah bertindak menurut undang-undang apabila menahan perayu selama tujuh hari di bawah s 117 KPJ. Beliau memilih untuk tidak campur tangan dengan perintah atau keputusan majistret. Tidak ada sebab untuk Mahkamah Rayuan campur tangan dengan perintah Mahkamah Tinggi (lihat perenggan 22); *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69 dirujuk.]

Notes

For cases on application to revoke remand order, see 5 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2731–2732.

For cases on communication between solicitor and client, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1985–1990.

For cases on investigation diary, see 5 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2767–2768.

For cases on legal professional privilege, see 7 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2258–2271.

For cases on powers of High Court, see 5 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3162–3163.

Cases referred to

Liaw Kwai Wah & Anor v PP [1987] 2 MLJ 69; [1987] 1 CLJ 35; [1987] CLJ Rep 163, SC (refd)

PP v Audrey Keong Mei Cheng [1997] 3 MLJ 477, CA (folld)

Re the detention of Leonard Teoh Hooi Leong [1998] 1 MLJ 757, HC (refd) A
Re the detention of R Sivarasa & Ors [1996] 3 MLJ 611, HC (folld)

Legislation referred to

Criminal Procedure Code ss 117, 119, 323, 324, 325, 326, 327
Courts of Judicature Act 1964 s 31 B
Evidence Act 1950 s 126

Appeal from: Criminal Review No 43/1 of 1998 (High Court, Johor Bahru)

Karpal Singh (Ram Karpal Singh with him) (Karpal Singh & Co) for the appellant. C
Ahmad Bache (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Raus Sharif JCA (delivering judgment of the court): D

[1] This is an appeal by the appellant against the decision of the High Court of Johor Bahru in dismissing the appellant's application to revise the magistrate's remand order. The magistrate had earlier remanded the appellant E for seven days under s 117 of the Criminal Procedure Code.

[2] We heard the appeal on 26 August 2009 and unanimously dismissed it. We now give our reasons. F

[3] The High Court had adequately dealt with the background facts (see *Re the detention of Leonard Teoh Hooi Leong* [1998] 1 MLJ 757). Thus, in this judgment we need only refer to some of the salient facts which are essential in determining the issues submitted. G

[4] The appellant is an advocate and solicitor. He was retained by Nor'aishah bt Bokhari ('Nor'aishah') to advise her on matters relating to her intended conversion to Christianity.

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[5] Nor'aishah is a Muslim woman, who had fallen in love and wanted to marry Joseph Arnold Lee ('Joseph') a Chinese Christian. Sometime in October 1997, Nor'aishah had decided to renounce her Islamic faith and embraced Christianity. A statutory declaration to that effect was prepared by the appellant. I

[6] On 22 October 1997, Nor'aishah affirmed the statutory declaration before a commissioner for oath, declaring that she had renounced Islam for Christianity.

[7] The statutory declaration was served by the appellant on the Majlis Agama Islam Wilayah Persekutuan as Nor'aishah was at the material time residing in Kuala Lumpur.

[8] On 19 November 1997, Nor'aishah broke the news about her conversion to Christianity and her love to Joseph to her parents. Her parents were shocked and distraught especially on her act of renouncing Islam for Christianity.

[9] The parents with the help of the family members brought Nor'aishah to their house in Pontian, Johor and kept her under confinement. However, on 30 December 1997, Nor'aishah with the assistance of Joseph disappeared from her parents' house.

[10] The disappearance of Nor'aishah was reported to the police vide Pontian Police Report No 17/78. The police report alleged that Nor'aishah had been kidnapped by her lover Joseph.

[11] The police conducted an extensive investigation over the alleged kidnapping of Nor'aishah. On 14 January 1998, the appellant was arrested. Following the arrest, the appellant was produced before a magistrate in Pontian. The magistrate remanded the appellant for seven days under s 117 of the Criminal Procedure Code ('CPC').

[12] By a letter dated 15 January 1998, Messrs Lee Min Choon & Co, acting for the appellant applied to the High Court Johor Bahru to exercise its revisionary powers to revoke the remand order of the magistrate. The letter challenged the propriety of the remand order.

[13] The learned High Court judge fixed the matter for hearing on 19 January 1998. After hearing the parties, he dismissed the application. He held that the magistrate had acted within the law and consequently there was nothing for him to revise. He gave the following reasons:

(a) As the police were investigating a kidnapping case involving Nor'aishah, the appellant's refusal to inform the police of her whereabouts made him a prime suspect.

(b) No doubt the appellant, as an advocate and solicitor cannot be compelled to disclose legitimate communications passing directly between him and his client. But the privilege does not extend to communications made in furtherance of a fraud or criminal act. Hence, the communication between the appellant and Nor'aishah were no longer privileged as it involved a criminal investigation.

(c) The procedure under s 117 of the CPC had been complied with by the investigating officer as the magistrate had before him, the police report and an investigation diary of the police.

[14] The complaint by the appellant, as advanced by his learned counsel, Mr Karpal Singh are these. The appellant cannot be a suspect just because the appellant refused to inform the whereabouts of Nor'aishah. The appellant was not obliged to divulge the information on the whereabouts of Nor'aishah, as the appellant was protected by client and solicitor privilege as provided under s 126 of the Evidence Act 1950. Consequently Mr Karpal Singh contended that in the circumstances of this case the detention of the appellant under s 117 of the CPC was an abuse of power by the police.

[15] To support his argument, Mr Karpal Singh referred to a newspaper cutting, *The Star* dated 19 June 2001. It was reported that Shaikh Daud JCA, speaking for the Court of Appeal when granting the appellant's application for extension of time to file leave to appeal had said the following:

> This is not an ordinary case. It is a case of a lawyer representing his client being arrested.
>
> In this case, if the police wanted information from the counsel (regarding the whereabouts of his client, a Muslim woman who had wanted to embrace Christianity), there are other ways.
>
> To remand him is an abuse of power.

[16] With utmost respect, we are of the view that what was said by the Court of Appeal as reported above cannot be the basis in deciding this appeal. What was decided by the Court of Appeal then was in relation to the appellant's application for extension of time to file leave to appeal to the Court of Appeal. Obviously, the full facts and the real issue in this appeal were not before the Court of Appeal then. In other words, the merits of the appeal was not decided upon by the Court of Appeal.

[17] The main issue in this case is whether the detention of the appellant under s 117 of the CPC was lawful. The working of s 117 of the CPC is well settled (see *Re the detention of R Sivarasa & Ors* [1996] 3 MLJ 611; *Public Prosecutor v Audrey Keong Mei Cheng* [1997] 3 MLJ 477). Section 117 of the CPC requires the police to produce a copy of the investigation diary before the magistrate as prescribed by s 119 when producing a suspect. The diary must provide a true picture of the proceedings in the investigation. If the magistrate upon perusal of the entire diary was satisfied that there were grounds for believing that the accusation or information against the suspect was well founded and it was necessary for the purpose of the investigation to remand him, then the magistrate would have to make the remand order. As

to the length of the remand order, it is within the discretion of the magistrate, who has to decide based on the nature and circumstances of each case provided that the detention shall not exceed 15 days in the whole as stated in the then s 117(2) of the CPC.

[18] In *Re the detention of R Sivarasa & Ors* KC Vohrah J (as he then was) held that the failure to transmit to the magistrate a copy of the entries was fatal to the application before the magistrate as it meant that the magistrate did not have the prescribed material to act upon her judicial enquiry whether to order for further remand. Similarly, in *Public Prosecutor v Audrey Keong Mei Cheng*, Shaikh Daud JCA held that since the police failed to produce a copy of the diary as prescribed by s 119 of the CPC, the registrar was right to refuse to order further detention of the respondent.

[19] We endorse the above views. In the present case, there is no dispute that the magistrate had before him a letter from ASP Puspanathan a/l L Wiresingam, the investigating officer of the case, which sets out the need to remand the appellant. The police report on the alleged kidnapping and most importantly, the investigation diary of the investigation officer was also transmitted to the magistrate for his perusal. The magistrate upon perusal of the investigation diary was satisfied that there were grounds for believing the accusation against the appellant was well founded and that it was necessary for the purpose of investigation to remand the appellant.

[20] It is our judgment that the learned High Court judge was right in not exercising his revisionary power, to reverse the decision of the magistrate. It is clear in this case that the procedure under s 117 of the CPC had been complied with. Further, we are in agreement with the learned trial judge that the appellant could not hide behind the 'skirt of privilege' when he was being investigated over a criminal case.

[21] Mr Karpal contended that the detention of the appellant was an abuse of power by the police. But the case before the magistrate was still at an investigation stage. At that stage it was not the duty of the magistrate to decide on the legality of the arrest or otherwise. The truth that the appellant was involved in the kidnapping could not be determined at that stage. To do so, would require the magistrate to embark on an inquiry which may in turn necessitate the calling of witnesses. That is not the purpose of s 117 of the CPC. Since the issue on the truth whether the appellant was involved in the kidnapping or otherwise was still under investigation, the learned judge of the High Court was in no position to determine that the act of the police in applying for the appellant's detention was an abuse of power by the police. If the appellant felt that the act of the police was in fact an abuse of power, he

was at liberty to take the appropriate action against the police. But we are of the view that it cannot be done by way of revision as done in this case.

[22] The revisionary powers of a High Court judge is found in s 31 of the Courts of Judicature Act 1964 and ss 323–327 of the CPC. It is a discretionary power. The object is for High Court to be satisfied as to the correctness, legality or propriety of any finding, sentence or order recorded or passed in respect of criminal proceedings and matters in the subordinate courts (see *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69; [1987] 1 CLJ 35 ; [1987] CLJ Rep 163). In the present case, the learned High Court judge had examined the record of the proceedings of the magistrate and found that the magistrate had acted within the law when remanding the appellant for seven days under s 117 of the CPC. He chose not to interfere with the magistrate's order or decision. We too chose not to interfere with the High Court's order. We have no reasons to do so.

[23] For the aforesaid reasons, we dismissed the appeal.

Appeal dismissed.

Reported by Andrew Christopher Simon